UNITED STATES ENERGY CORP. ET AL.

IBLA 81-220 Decided September 28, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, declaring mining claims abandoned and void. WMC 75801 through WMC 78057.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In

enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Authority: Generally -- Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to determine whether the mining claim recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

APPEARANCES: Keith M. Crouch, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The U.S. Energy Corporation, Washtenaw Energy Corporation, and the Western Standard Corporation appeal from the decision of the Wyoming State Office, Bureau of Land Management (BLM), dated November 18, 1980, holding appellant's mining claims, 1/ WMC 75801 through WMC 78057, abandoned and void because of the failure of the claimants to file evidence of annual assessment work or, alternatively, notices of intention to hold the claims, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), section 314, 43 U.S.C. § 1744 (1976), and corresponding regulations 43 CFR 3833.2-1 and 43 CFR 3833.4(a).

In their statement of reasons for appeal appellants do not deny that no affidavits of the performance of assessment work or notices of intention to hold the claims were filed prior to October 22, 1979, the applicable deadline as set forth in the statute and regulations. Rather, appellants argue that the summary procedure by which the claims were conclusively presumed abandoned and void without notice and an opportunity for a hearing constitutes a deprivation of property without due process of law in violation of the Fifth Amendment to the United States Constitution. Further, appellants argue that the summary procedure is arbitrary, capricious, unreasonable, not necessary to further the stated objectives of the Federal Land Policy and Management Act of 1976, and is thus in violation of appellants' right to due process as guaranteed by the Fifth Amendment. Finally, appellants assert that the BLM cancellation of their mining claims constitutes a compensable taking of a vested property interest within the ambit of the due process clause of the Fifth Amendment.

1/ The claims are listed by name, serial number, and date of location in BLM's November 18, 1980, decision, to which reference is here made.

The record indicates that all of appellants' claims were located prior to October 21, 1976, 2/ and therefore, either affidavits of performance of assessment work or notices of intention to hold were required to be submitted to BLM on or before October 22, 1979. 43 CFR 3833.2-1(a). Appellants' affidavits of performance of assessment work were not received by BLM until November 16, 1979. Accordingly, BLM issued its decision declaring the claims abandoned and void.

[1] Under section 314 of the FLPMA, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before October 21, 1976, must file notice of intention to hold the claim, or evidence of the performance of annual assessment work on the claim, in the proper BLM office on or before October 22, 1979, and prior to December 31 of each year thereafter. This requirement is mandatory, not discretionary, and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner, and renders the claim void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980).

[2] The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. Lynn Keith, supra at 196, 88 I.D. at 371-72.

"Section 1744(c) [of FLPMA] leaves the Secretary no discretion, requiring that the claims be conclusively deemed abandoned when the filing provisions are not met." Western Mining Council v. Watt, 643 F.2d 618, 628 (9th Cir. 1981). In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Lynn Keith, supra at 196, 88 I.D. at 372; Thomas F. Byron, 52 IBLA 49 (1981).

Appellants' challenge of the constitutionality of the statue and regulations, while well argued, cannot be sustained. To the extent that due process of law requires that claimants be afforded some form of hearing prior to declaring their unpatented mining claims abandoned and void for failure to timely file the documents required by section 314 of FLPMA, that requirement is satisfied by claimants' right of appeal to this Board. John J. Schnabel, 50 IBLA 201, 204 (1980). No evidentiary hearing is required where the validity of a claim depends upon the legal effect to be given uncontested facts of record. John J. Scnhabel, supra at 204; Dorothy Smith, 44 IBLA 25 (1979); see United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889, 890 (9th Cir. 1966).

2/ The appendix to the BLM decision appealed from indicates that the location date for the Kirk #148 through #169 claims (WMC 75948 through WMC 75969) is May 3, 1979. A check of the appropriate records, however, discloses that the actual location date is May 3, 1973, and thus the date in the appendix is a typographical error.

[3] The applicable regulations merely mirror the statute and, to the extent that they have been considered by the courts, they have been upheld. See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981); Western Mining Council v. Watt, supra. This Board has no authority to declare a duly promulgated Departmental regulation invalid where the regulation is consistent with the underlying statutory authority. Colorado-Ute Electric Association, Inc., 46 IBLA 35, 47 (1980); see Arizona Public Service Co., 20 IBLA 120, 123 (1975); Duncan Miller, 12 IBLA 206 (1973); cf., Feldslite Corp. of America, 56 IBLA 78, 88 I.D. 643 (1981) (regulation which compels a result not authorized by statute will not be followed to extent inconsistent); Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981) (regulation which has no statutory basis will be afforded no force or effect).

With respect to the constitutionality of the statute, this Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is constitutional. Lynn Keith, supra; Alex Pinkham, 52 IBLA 149 (1981). Jurisdiction of such an issue is reserved exclusively to the judicial branch.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge.